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Co-Lead Class Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**NOTICE OF MOTION AND MOTION
FOR ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES, AND
SERVICE AWARDS**

Date: May 1, 2014
Time: 1:30 pm
Courtroom: Room 8, 4th Floor
Judge: Honorable Lucy H. Koh

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on May 1, 2014 at 1:30 pm., or as soon thereafter as this matter may be heard, before the Honorable Lucy H. Koh, United States District Court for the Northern District of California, located in Courtroom 8, on the 4th Floor of the Robert F. Peckham Federal Building, 280 South 1st Street, San Jose, California, Plaintiffs will, and hereby do, move the Court pursuant to Federal Rule of Civil Procedure 23(h)(1) and 54(d)(2) for an order awarding:

1. Attorneys' fees to Class Counsel in the amount of \$5,000,000, which is twenty-five percent of the Settlement Funds totaling \$20,000,000;
2. \$3,699,844.31 in expenses Class Counsel necessarily incurred in connection with the prosecution of this action prior to October 30, 2013, the date of Preliminary Settlement Approval; and
3. Service awards amounting to a total of \$20,000 for each of the five court-appointed Class Representatives, to be paid pursuant to the Settlement Agreement with Lucasfilm Ltd. And Pixar ("Lucasfilm/Pixar Settlement") and the Settlement Agreement with Intuit, Inc. ("Intuit Settlement"), each of which provides for a separate award of \$10,000 for each Class Representative.

This motion is based on this Notice of Motion and the accompanying Memorandum of Points and Authorities; the Declaration of Kelly M. Dermody ("Dermody Decl."); the Declaration of Joseph Saveri; the Declaration of Linda P. Nussbaum, the Declaration of Eric Cramer; the Declarations of Class Representatives Michael Devine, Mark Fichtner, Siddharth Hariharan and Daniel Stover; the Declaration of Dean Harvey on behalf of deceased Class Representative Brandon Marshall; argument by counsel at the hearing before this Court; any papers filed in reply; and all papers and records in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs respectfully move this Court for an order granting: (1) attorneys’ fees in the amount of \$5,000,000, representing twenty-five percent (25%) of the overall \$20 million amount that Defendants Intuit, Inc., Lucasfilm Ltd., and Pixar (“Settling Defendants”) have agreed to pay to resolve the claims against them (hereinafter “Settlement Funds”); (2) reimbursement of \$3,699,844.31 in out-of-pocket expenses that Class Counsel incurred in successfully prosecuting the claims in this action; and (3) service awards in the total amount of \$20,000 each to Class Representatives Michael Devine, Mark Fichtner, Siddharth Hariharan and Daniel Stover, as well as to the estate of recently deceased Class Representative Brandon Marshall.¹

A fee award of twenty-five percent is the “bench mark” fee award for common fund class settlements, like this one, in the Ninth Circuit. *Paul, Johnson, Alston & Hunt v. Granulity*, 886 F.2d 268, 272 (9th Cir. 1989). That “bench mark” is subject to adjustment—up or down—based on a number of factors all of which would apply here, were Plaintiffs’ counsel to request such an adjustment. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002). Nonetheless, Class Counsel do not make a request for such adjustment. Class Counsel have litigated this case tenaciously, fronting all costs and working on a contingency basis against the almost boundless resources of the seven Defendants. The two Settlements (against the smallest employers in the alleged conspiracy²) ensure that Class members will receive partial payments for their alleged losses. The Lucasfilm/Pixar Settlement creates an all-cash fund of \$9,000,000 and the Intuit Settlement creates an all-cash fund of \$11,000,000, for a total of \$20,000,000 for the benefit of the Class. Importantly, the Settlements preserve Plaintiffs’ claims against the four Non-Settling Defendants for the *entire* amount of Plaintiffs’ damages based on joint and several liability under the antitrust laws.

¹ Both of the Settlements provide for a service award of \$10,000 for each Class Representative, generating a total award of \$20,000 for each Class Representative. Lucasfilm/Pixar Settlement § VI; Intuit Settlement § VI.

² As a point of reference, Intuit, Lucasfilm, and Pixar together account for less than 8% of Class members, and together account for approximately 5% of total Class compensation. *See* Oct. 1, 2012 Leamer Report at p.23; Dkt. 190.

1 This complex action entailed significant risks for Class Counsel and created exceedingly
 2 high demands on their time and resources. At every stage of this litigation, all seven Defendants
 3 vigorously contested it. Prior to Preliminary Settlement Approval, lawyers representing the
 4 Plaintiffs expended thousands of hours prosecuting this case, including reviewing millions of
 5 pages of documents; preparing for and taking or defending nearly 100 depositions; and preparing
 6 and submitting voluminous filings in support of class certification, among other things.
 7 Declaration of Kelly M. Dermody in Support of Plaintiffs' Motion for Attorneys' Fees,
 8 Reimbursement of Expenses, and Service Awards ["Dermody Decl."], ¶ 9. Class Counsel have
 9 also incurred substantial out-of-pocket costs to advance this litigation, including for statistical,
 10 compensation design, and labor market experts; deposition reporting and transcripts; mediation
 11 services; and litigation support vendors. *See id.* Class Counsel's request for reimbursement of
 12 \$3,699,844.31 for expenses incurred as of October 30, 2013 (the date of Preliminary Settlement
 13 Approval) is also fully supported by applicable law. Finally, the \$20,000 service awards
 14 requested for the Class Representatives are reasonable in light of the benefit afforded to the Class,
 15 the time and effort the Class Representatives expended in furtherance of the litigation, and the
 16 risks they endured in order to vindicate not only their rights, but the rights of all absent Class
 17 members.

18 For the reasons set forth below, Plaintiffs respectfully submit that the attorneys' fees,
 19 expense reimbursements, and service awards to the Class Representatives are fair and reasonable
 20 under the applicable legal standards, and should be granted by this Court.

21 **II. CLASS COUNSEL ARE ENTITLED TO A REASONABLE FEE OF TWENTY-**
 22 **FIVE PERCENT OF THE SETTLEMENT FUNDS**

23 The firms of Lieff, Cabraser, Heimann & Bernstein, LLP ("LCHB"); the Joseph Saveri
 24 Law Firm, Inc. ("JSLF"); Berger & Montague, P.C. ("Berger & Montague") and Grant &
 25 Eisenhofer PA ("G&E") (collectively, "Class Counsel") are entitled to reasonable attorneys' fees
 26 to compensate them for their work on behalf of the Class. Class Members have been notified of
 27 Class Counsel's intent to seek attorneys' fees. *See* Court-Approved Revised Notice, Dkt. 553-1
 28 ("Plaintiffs' Counsel will also ask the Court to approve payment of attorneys' fees of up to thirty

1 percent (or \$6 million) of the Settlement Funds.”).

2 It is well settled that “a lawyer who recovers a common fund for the benefit of persons
3 other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.”
4 *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Mills v. Elec. Auto-Lite Co.*, 396
5 U.S. 375, 393 (1970); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123 (1885). The
6 purpose of this doctrine is that “those who benefit from the creation of the fund should share the
7 wealth with the lawyers whose skill and effort helped create it.” *In re Washington Pub. Power*
8 *Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) (“WPPSS”).

9 These principles are particularly important in complex litigation, where private
10 enforcement is a necessary component of legal compliance. *See, e.g., Pillsbury Co. v. Conboy*,
11 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 331 (1979); *Hawaii v.*
12 *Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972); *Perma Life Mufflers, Inc. v. Int’l Parts*
13 *Corp.*, 392 U.S. 134, 139 (1968). Fee awards in successful cases, such as this one, encourage
14 meritorious class actions, and thereby promote private enforcement of, and compliance with, the
15 antitrust laws. As noted by the Second Circuit in *Alpine Pharmacy, Inc. v. Charles Pfizer & Co.,*
16 *Inc.*, “[i]n the absence of adequate attorneys’ fee awards, many antitrust actions would not be
17 commenced” 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973). Antitrust
18 law, in particular, “depends heavily on the notion of the private attorney general as a vindicator of
19 the public policy.” *Id.* (citing *Perma Life Mufflers*, 392 U.S. at 134).

20 In the Ninth Circuit, the district court has discretion in a common fund case to choose
21 either the “percentage-of-the-fund” or the “lodestar” method in calculating fees. *Fischel v.*
22 *Equitable Life Assur. Soc’y*, 307 F.3d 997, 1006 (9th Cir. 2002); *Wininger v. SI Mgmt. L.P.*, 301
23 F.3d 1115, 1123-24 & n.9 (9th Cir. 2002); *Vizcaino*, 290 F.3d at 1047; *WPPSS*, 19 F.3d at 1296.
24 Modern courts exhibit a clear preference for the “percentage-of-the-fund” method,³ and virtually
25 all of the major recent antitrust cases in this District have applied the percentage of the fund
26 approach. *See, e.g., In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827 (N.D. Cal.

27
28 ³ *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Award*,
7 J. Empirical Legal Stud. 811, 832 (2010).

January 14, 2013)⁴; *Meijer v. Abbott Laboratories*, No. 07-05985 (N.D. Cal. Aug. 11, 2011); *Ross v. U.S. Bank Nat'l Ass'n*, No. 07-02951, 2010 U.S. Dist. LEXIS 107857, at *4-5 (N.D. Cal. Sept. 29, 2010); *In re CV Therapeutics, Inc. Securities Litig.*, No. 03-3709, 2007 U.S. Dist. LEXIS 98244, at *2 (N.D. Cal. April 4, 2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M-02-1486, 2007 U.S. Dist. LEXIS 103027, at *1-2 (N.D. Cal. Aug. 16, 2007); *In re Sorbates Direct Purchaser Antitrust Litig.*, No. 98-4886, 2002 U.S. Dist. LEXIS 23468, at *9-10 (N.D. Cal. Nov. 15, 2002); *Van Vranken v. ARCO*, 901 F. Supp. 294, 298 (N.D. Cal. 1995).

As described above, the Ninth Circuit has recognized twenty-five percent as the bench mark percentage for the fee award, *see Paul, Johnson*, 886 F.2d at 272, and that is the amount Plaintiffs seek here. In *Vizcaino*, the Ninth Circuit established that a court may adjust a fee award upward or downward from the twenty-five percent bench mark based on the following factors:

- (1) the exceptional results for the class;
- (2) the risk for its counsel;
- (3) whether any individual non-monetary benefits were obtained;
- (4) whether the fee is at or below market rates; and
- (5) the burden on class counsel of prosecuting the case, including whether the case was litigated on a contingency basis.

290 F.3d at 1048-50 (internal quotations omitted).

Each of the *Vizcaino* factors weigh in favor of granting approval of Plaintiffs' application for a bench mark fee award and would, indeed, support a fee award in excess of that requested here.

A. Class Counsel Obtained Excellent Results for the Class In Light of the Burdens of the Litigation.

This case has been hotly contested by all Defendants. Class Counsel have expended extraordinary efforts to marshal the complex and voluminous statistical and documentary evidence required for class certification and the merits. Plaintiffs have been tested at every step of the process.

⁴ All unpublished orders cited herein are attached as Exhibits 9-17 to the Dermody Decl.

1 For example, as the Court well knows, Defendants mounted substantial challenges at the
 2 outset, seeking to dismiss Plaintiffs' Consolidated Amended Complaint. Dkts. 79 and 83. The
 3 Court denied both motions in substantial part.⁵ Dkt. 120 (Apr. 18, 2012 Order).

4 The parties completed broad, extensive, and thorough discovery related to both class
 5 certification and the merits after the Court lifted a discovery stay in January 2012. Prior to
 6 October 30, 2013 (the date this Court preliminarily approved the Settlements), Plaintiffs served
 7 seventy-five document requests, in response to which Defendants collectively produced over
 8 325,000 documents (over 3.2 million pages). Dermody Decl., ¶ 9. Plaintiffs also took or
 9 defended nearly 100 depositions, including those of 85 Defendant fact witnesses and all five
 10 Class Representatives. *Id.* Defendants propounded document requests, in response to which
 11 Plaintiffs produced over 31,000 pages. *Id.* With expert assistance, Plaintiffs' counsel analyzed
 12 vast amounts of computerized employee compensation and recruiting data, including nearly 1,000
 13 files of employment related data exceeding fifteen gigabytes. *Id.* The discovery process, which
 14 is now complete, was comprehensive, and it required the parties to engage in numerous and
 15 extensive meetings and conferences concerning the scope of discovery and the analysis regarding
 16 the various electronic data, policy documents, and other files produced. *Id.*

17 Plaintiffs filed a motion for class certification on October 1, 2012. The motion required
 18 intense marshaling of the documentary record, and also a lengthy report by Dr. Edward E.
 19 Leamer of UCLA. The report included a working model of damages. Defendants opposed the
 20 motion with their own declarations and expert report. The parties deposed each other's experts.
 21 Plaintiffs filed reply papers in December, 2012, and argued the motion in January, 2013.

22 On April 5, 2013, the Court issued its Order Granting in Part and Denying in Part
 23 Plaintiffs' Motion for Class Certification. Dkt. 382. The Court requested further briefing on
 24 whether the Rule 23(b)(3) predominance standard was met with respect to the common impact on
 25 the proposed class. *Id.* at 45. The Court recognized that significant discovery had been
 26 completed since Plaintiffs filed their initial Motion for Class Certification on October 1, 2012. *Id.*

27
 28 ⁵ The only exception was that Plaintiffs' UCL claim for restitution and disgorgement was
 dismissed for failure to allege a vested interest. Dkt. 120 (Apr. 18, 2012 Order).

1 at 45 (“the Court believes that, with the benefit of discovery that has occurred since the hearing
 2 on this motion, Plaintiffs may be able to offer further proof to demonstrate how common
 3 evidence will be able to show class-wide impact to demonstrate why common issues predominate
 4 over individual ones.”).

5 Plaintiffs’ Supplemental Motion for Class Certification marshaled additional documentary
 6 evidence, testimony, and expert analyses. *See* Dkt. 418-1 (Declaration of Dean M. Harvey); Dkt.
 7 418-2 (Declaration of Lisa J. Cisneros); Dkt. 418-4 (Leamer Supplemental Report); Dkt. 418-3
 8 (Hallock Report); Dkt. 456 (Declaration of Anne B. Shaver); Dkt. 457 (Declaration of Anne B.
 9 Shaver). Upon considering the additional, voluminous evidentiary record in support of class
 10 certification, the Court granted Plaintiffs’ motion on October 24, 2014, Dkt 531.⁶

11 In addition to the litigation efforts and success, Class Counsel have secured the
 12 Settlements totaling \$20 million for the benefit of the Class. The Settlement Funds will be
 13 available to Class members without the uncertainties and delays associated with Non-Settling
 14 Defendants’ pending motions for summary judgment and evidentiary challenges, as well as trial.
 15 Furthermore, Settling Defendants have agreed to maintain confidentiality regarding whether and
 16 how Class members respond to the Class notice. Lucasfilm/Pixar Settlement § II.A and Ex. B at
 17 10; Intuit Settlement § II.A and Ex. B and 10. Notably, though Plaintiffs have settled their claims
 18 with three of the Defendants, they will continue to pursue from Non-Settling Defendants
 19 monetary recovery for the *entire* amount of Plaintiffs’ damages based on joint and several
 20 liability under the antitrust laws. As additional non-monetary consideration, the Settling
 21 Defendants have agreed to certain cooperation with Class Counsel in the further prosecution of
 22 Plaintiffs’ claims against the Non-Settling Defendants. Lucasfilm/Pixar Settlement § III.B; Intuit
 23 Settlement § III.B.

24 Taking account of the monetary and non-monetary aspects of the Settlements, as well as
 25 the litigation achievements of Class Counsel, it is clear that Class Counsel have provided a
 26

27 ⁶ Plaintiffs have continued litigating the case against the non-Settling Defendants, successfully
 28 defeating a Fed. R. Civ. Proc. 23(f) petition of the class certification order, opposing summary
 judgment motions, moving to strike and opposing such motions with respect to certain expert
 testimony, and preparing for trial.

1 significant benefit to the Class especially when weighed against the burdens of this resource-
2 intensive case.

3 **B. Class Counsel Assumed Significant Risks In Light of the Complexity of the**
4 **Legal and Factual Issues in this Case.**

5 Uncertainty that an ultimate recovery will be obtained is highly relevant in determining
6 the reasonableness of an award. *See Vizcaino*, 290 F.3d at 1048 (“Risk is a relevant
7 circumstance” in applying the percentage fund method); *see also City of Detroit v. Grinnell*
8 *Corp.*, 495 F.2d 448, 470-71 (2d Cir. 1974) (“[D]espite the most rigorous and competent of
9 efforts, success is never guaranteed.”).

10 Large-scale antitrust and employment cases of this type are, by their very nature,
11 complicated and time-consuming. Here, Class Counsel prosecuted this action without any
12 assurance of payment for their services, litigating this case on a wholly contingent basis in the
13 face of significant risk. Dermody Decl., ¶¶ 10, 21. In addition, Class Counsel overcame attacks
14 on the pleadings, discovery obstacles, and a rigorous class certification process that required two
15 full rounds of briefing and expert analysis. There has been at all times the very real possibility of
16 an unsuccessful outcome and no fee of any kind, despite the significant costs advanced by Class
17 Counsel on behalf of the Class. Plaintiffs amply satisfy this requirement.

18 **C. Awards in Similar Cases Demonstrate That Class Counsel Seek A Modest Fee**
19 **Award.**

20 As described above, Class Counsel’s request for twenty-five percent of the Settlement
21 Funds adheres to the Ninth Circuit’s established bench mark. *Paul, Johnson*, 886 F.2d at 272. In
22 fact, the request is modest compared with the percentages awarded plaintiffs’ counsel in other
23 major antitrust or employment cases in this District. *See, e.g., Vedachalam v. Tata Consultancy*
24 *Servs. Ltd.*, No. 06-0963, 2013 U.S. Dist. LEXIS 100796, at *1-2 and 10 (N.D. Cal. July 18,
25 2013) (awarding 30% of \$29,750,000 settlement fund in an employment class action); *In re: TFT-*
26 *LCD (Flat Panel) Antitrust Litig.*, No. 07-1827 (N.D. Cal. January 14, 2013) (30%); *Meijer v.*
27 *Abbott Laboratories*, No. 07-05985 (N.D. Cal. Aug. 11, 2011) (33 1/3%). At most, the requested
28 amount here is equivalent to comparable cases. *See Buccellato v. AT&T Operations, Inc.*, No. 10-

00463, 2011 U.S. Dist. LEXIS 111361 (N.D. Cal. June 30, 2011) (25 %); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M-02-1486, 2007 U.S. Dist. LEXIS 103027, at *1-2 (N.D. Cal. Aug. 16, 2007) (25%); *In re Sorbates Direct Purchaser Antitrust Litig.*, No. 98-4886, 2002 U.S. Dist. LEXIS 23468, at *9-10 (N.D. Cal. November 18, 2002) (25%); *Van Vranken v. ARCO*, 901 F. Supp. 294 (N.D. Cal. 1995) (25%). As these precedents demonstrate, twenty-five percent, at a minimum, would be consistent with recognized “market rates” in this District. *See Vizcaino*, 290 F.3d at 1050 (noting that “market rates” are a question of “lawyers’ reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size.”).

Furthermore, since establishing the twenty-five percent bench mark in *Paul, Johnson*, 886 F.2d at 268, courts within the Ninth Circuit have routinely awarded fees above this bench mark in various types of complex litigation. *See, e.g., In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming fee award equal to 33% of fund); *Garner v. State Farm Ins.*, No. 08-1365, 2010 U.S. Dist. LEXIS 49482 (N.D. Cal. April 22, 2010) (awarding fee of 30% of the \$15 million settlement fund); *In re CV Therapeutics, Inc. Sec. Litig.*, No. 03-3709, 2007 U.S. Dist. LEXIS 98244 (N.D. Cal. April 4, 2007) (30%); *In re Pac. Enters. Sec. Litig.*, 47 F.3d at 379 (affirming award equal to 33% of common fund); *Brailsford v. Jackson Hewitt Inc.*, No. 06-00700, 2007 U.S. Dist. LEXIS 35509 (N.D. Cal. May 3, 2007) (awarding fee equal to 30% of settlement fund); *In re Heritage Bond Litig.*, MDL No. 02-1475, 2005 U.S. Dist. LEXIS 13555, at *59, n.12 (C.D. Cal. June 10, 2005) (noting that more than 200 federal cases have awarded fees higher than 30%); *Hernandez v. Kovacevich “5” Farms*, No. 04-cv-5515, 2005 U.S. Dist. LEXIS 48605, at *25-31 (E.D. Cal. September 30, 2005) (33.3% of the \$2.52 million settlement in an employment class action); *Linney v. Cellular Alaska P’ship*, No. 96-3008, 1997 U.S. Dist. LEXIS 24300, *20 (N.D. Cal. Jul. 18, 1997) (33.3% fee); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) (32.8% fee) (decided after *Paul, Johnson*). Indeed, more than one court in this district has recognized that “in most common fund cases, the award exceeds [the twenty-five percent] benchmark.” *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047-48 (N.D. Cal. 2007) (referencing *Activision*, 723 F. Supp. at 1377-78, for conclusions that “nearly all common fund

awards range around 30% . . . [and that] absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%”).

The awards granted in these complex cases demonstrate that a fee award at the Ninth Circuit bench mark is appropriate under these circumstances.

D. Other Factors Support Approval of Class Counsels’ Fee Request

In addition to the *Vizcaino* factors, the Court may consider other factors including: counsel’s skill and experience and counsel’s lodestar. *See, e.g., In re Heritage Bond Litig.*, MDL 02-1475, 2005 U.S. Dist. LEXIS 13555, at *64-74 (C.D. Cal. June 10, 2005).

1. Counsel’s Skill and Experience

Class Counsel’s skill and experience weigh in favor of granting the requested fees. As detailed below, Class Counsel have substantial experience prosecuting large-scale complex class actions.

The LCHB attorneys principally charged with litigating this case have significant experience in successfully representing clients in complex class actions, as set forth in the LCHB firm resume. *See* Dermody Decl., Ex. A. Partner Richard M. Heimann is a highly-regarded trial lawyer, with extensive experience litigating plaintiff-side antitrust, securities, consumer, and personal injury cases. *Id.*, ¶ 8. He has tried over thirty civil jury trials, including the trial for the Direct-Purchaser Plaintiff Class in *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 3:07-md-1827, before Judge Susan Illston. *Id.* Partner Kelly M. Dermody is Managing Partner of LCHB’s San Francisco Office and chairs the firm’s employment practice. *Id.* She has extensive experience litigating plaintiff-side employment and consumer matters and is one of four plaintiffs’ lawyers nationally appointed to the Governing Council of the American Bar Association’s Section of Labor and Employment Law. *Id.* Partner Brendan P. Glackin is a member of LCHB’s antitrust practice group, with expertise in the telecommunications, computer, and high-tech industries. *Id.* Mr. Glackin has tried more than twenty criminal and civil matters. He served as a member of the *TFT-LCD* trial team, and served as co-trial counsel in the antitrust matter *Meijer v. Abbott Laboratories*, No. 07-5985, before Judge Claudia Wilken, and *In re: Titanium Dioxide Antitrust Litigation*, No. 10-00318 (RDB), in the District of Maryland. *Id.* In

1 2013, *the Recorder* recognized the firm's antitrust practice group as among the top three in
 2 California. *Id.*

3 The Court previously appointed Joseph Saveri as Interim Lead Counsel while he was a
 4 partner at the Lieff Cabraser firm. After opening his own firm, he was appointed to serve as Co-
 5 Lead Counsel with the Lieff Cabraser firm. Prior to opening his own law firm, Mr. Saveri served
 6 as the chair of LCHB's antitrust and intellectual property practice group. During his 25 year
 7 career, Mr. Saveri has represented plaintiffs in numerous antitrust and other cases, including most
 8 recently the direct purchaser price-fixing claims against the cartel of TFT-LCD manufacturers
 9 which produced over \$400 million in settlements. Mr. Saveri has been recognized as a leader in
 10 the antitrust field and has served as a lead counsel in a number of significant and ground-breaking
 11 antitrust cases, class actions and other complex cases. *See* www.saverilawfirm.com.

12 Berger & Montague is a nationally recognized firm specializing in antitrust and securities
 13 litigation on behalf of plaintiffs. Berger & Montague has played leading roles in major class
 14 action cases for approximately forty years, resulting in recoveries totaling billions of dollars for
 15 the firm's clients and the classes it has represented. Eric L. Cramer is lead counsel in several
 16 antitrust cases and other litigation in a variety of industries and numerous courts across the
 17 country. He has been recognized as a leading attorney in the field of complex antitrust litigation.
 18 *See* www.bergermontague.com.

19 Grant & Eisenhofer is one of the largest plaintiffs' class action firms in the nation. Over
 20 the past five years alone, the firm has obtained recoveries totaling over \$12.5 billion for plaintiffs
 21 in cases in which the firm served as lead or co-lead counsel. Linda P. Nussbaum, chair of the
 22 firm's antitrust practice, has served as lead or co-lead counsel in numerous complex antitrust class
 23 actions, in which she has obtained precedent-setting victories and achieved substantial recoveries
 24 for plaintiff classes. *See* www.gelaw.com.

25 Together, Class Counsel bring to this case the skills and experience necessary to
 26 successfully litigate an action of this size and complexity.

27 **2. A Partial Lodestar Cross-Check Alone Supports the Fee Request**

28 "A lodestar cross-check is not required in this circuit, and in some cases is not a useful

reference point.” *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1122 (C.D. Cal. 2008). Here, however, a cross-check of the lodestar of just one Co-Lead Counsel firm demonstrates that the requested fee is reasonable. For example, LCHB alone has invested \$8,413,346.50 in lodestar, based on 17,951.4 hours of work LCHB alone performed from inception through Preliminary Settlement Approval. *See* Dermody Decl., ¶ 15, Ex. 8; *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005) (“[T]he lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.”). This lodestar cross-check would be substantially higher if it included all Class Counsel firms. It demonstrates that Class Counsel’s time and effort committed to this case far exceed their fee request of \$5,000,000. On this basis alone, there is no doubt that the fees requested are reasonable. *See Vizcaino*, 290 F.3d at 1050 (“the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted,”).

3. **Class Members Will Have the Opportunity to Review Class Counsel’s Fee Request Prior to the Deadline for Objections.**

The Class Notice informed Class members that Class Counsel would request up to thirty percent (30%) of the fund, plus costs. *See* Dkt. 553-1. The amount now requested is thus lower than what might have been requested pursuant to the Notice. Nevertheless, to date no Class Member has filed an objection to the amount of Class Counsel’s fee and cost request. Dermody Decl., ¶ 19. This brief and supporting documentation will also be posted on the websites of Co-Lead Class Counsel as well as the website established for the Settlements. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994-95 (9th Cir. 2010).

In sum, taking account of these additional four considerations, along with the *Vizcaino* factors, Plaintiffs’ fee request is reasonable and should be approved.

III. CLASS COUNSEL ARE ENTITLED TO REIMBURSEMENT OF EXPENSES UNDER THE SETTLEMENT AGREEMENT.

Class Counsel request reimbursement of expenses incurred as of October 30, 2013, in the amount of \$3,699,844.31 to be paid from the Settlement Funds. Dermody Decl., ¶¶ 3,5; *see also*

1 *id.*, Ex. 3 (Saveri Decl.), at ¶ 5; *id.*, Ex. 4 (Cramer Decl.), at ¶ 5; *id.*, Ex.5 (Nussbaum Decl.), at
 2 ¶ 5. “Attorneys may be compensated for reasonable out-of-pocket expenses incurred and
 3 customarily charged to their clients, as long as they were ‘incidental and necessary to the
 4 representation’ of those clients.” *Mitland Raleigh-Durham v. Myer*, 840 F. Supp. 235, 239
 5 (S.D.N.Y.) (citation omitted). Under the common fund doctrine, Plaintiffs’ Counsel are entitled
 6 to reimbursement of all reasonable out-of-pocket expenses and costs in prosecution of the claims
 7 and in obtaining a settlement. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir.
 8 1977).

9 The majority of the costs (over \$2.5 million) were incurred to develop expert testimony
 10 from numerous expert economists and others. Dermody Decl., ¶ 5, Ex. 2. This included expert
 11 statistical review and analysis of Defendants’ personnel and compensation databases and systems
 12 and the drafting of the five expert reports submitted in support of class certification (four by Dr.
 13 Leamer and one by Dr. Hallock). This work included comprehensively analyzing compensation
 14 and other employee records from the seven Defendants. The data did not all arrive in the same
 15 format; so it had to be processed so that it could all be incorporated in the same statistical
 16 analyses. The expert work ultimately included estimation of damages through multivariate linear
 17 regression analysis; use of several correlation and regression analyses to assess the existence of a
 18 job-title level compensation structure; and a comprehensive review and analysis of Defendants’
 19 compensation systems. Plaintiffs’ experts and consultants also had to analyze and respond to
 20 many quantitative and other analyses submitted by defense experts Dr. Kevin Murphy and
 21 Dr. Kathryn Shaw. Plaintiffs’ experts and consultants also conducted extensive analysis to
 22 address a number of the affirmative defenses and other assertions Defendants have offered to
 23 explain or excuse their conduct.

24 In addition, there were substantial other expenses incurred to host and organize the
 25 mammoth production of electronically stored information and data produced by Defendants.
 26 Other necessary costs included: court reporter and videographer fees for depositions; court and
 27 process server fees; postage and carrier fees; electronic research; mediator’s fees; photocopies;
 28 and case-related travel. Dermody Decl., ¶ 5, Ex. 2. These are reasonable and standard expenses

of litigation. *See* H. Newberg, ATTORNEY FEE AWARDS § 2.19 at 69 (1986). Accordingly, the Court should grant the expense reimbursement.

IV. THE REQUESTED SERVICE AWARDS ARE REASONABLE.

The Ninth Circuit has recognized that named plaintiffs are eligible for reasonable service awards. *Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003); *Rodriguez v. West Pub'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (service awards “are fairly typical in class action cases.”). Service awards are generally provided after a settlement or verdict has been achieved. *Rodriguez*, 563 F.3d at 959. Such awards are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and to recognize their willingness to act as private attorneys general. *Id.* at 958-959.

Under *Staton*, such awards should be evaluated using “relevant factors, includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of workplace retaliation.” *Staton*, 327 F.3d at 977 (internal quotation marks and citation omitted). District courts are required to scrutinize “all incentive awards to determine whether they destroy the adequacy of the class representatives.” *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1164 (9th Cir. 2013). Here, the Class Representatives satisfy the Ninth Circuit’s requirements for service awards.

A. The Class Representatives Have Taken Significant Steps to Advance the Litigation and Have Expended Substantial Time and Effort On Behalf of the Class.

The Court should grant the requested service awards based on the significant work that the Class Representatives undertook on behalf of the class.

Courts recognize the important factual knowledge that plaintiffs bring to employment-related class actions, including information about employer policies and practices. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005) (recognizing the important role that plaintiffs play as the “primary source of information concerning the claims[.]” including by responding to counsel’s questions and reviewing documents); *Parker v. Jekyll & Hyde Entm’t Holdings, L.L.C.*, No. 08-7670, 2010 U.S. Dist. LEXIS 12762, at *4-5 (S.D.N.Y. 2010)

(recognizing efforts of plaintiffs including meeting with counsel, reviewing documents, formulating the theory of the case, identifying and locating other class members to expand settlement participants, and attending court proceedings).

Here, the Class Representatives have made important contributions to the prosecution and fair resolution of this action on behalf of Class members. They have each provided extensive assistance to the case by meeting with Class Counsel regarding the initial investigation; preparing and reviewing the complaint; reviewing drafts of pleadings and other documents; gathering documents and other potential evidence about Defendants and their claims; assisting with various aspects of written and other discovery; appearing for their depositions; discussing the strategy and progress of all mediations in the case; and participating in regular conversations about the case, as well as in regular email correspondence. Devine Decl., ¶ 8; Fichtner Decl., ¶ 8, Hariharan Decl., ¶ 8, Stover Decl., ¶ 8, Harvey Decl., ¶ 10. Four of the Class Representatives will continue their important role as the litigation advances with no guarantee of success going forward.⁷

The record amply demonstrates that the \$20,000 in requested service awards (\$10,000 per settlement) for each of the Class Representatives is reasonable in light of their vigorous pursuit of the class claims since the inception of this litigation.

B. The Class Representatives Assumed Significant Risks in Leading this Case.

In assessing the reasonableness of service awards, courts consider the risks that the class representatives assumed in serving the interests of the class. *See Frank*, 228 F.R.D. at 187; *Parker*, 2010 U.S. Dist. LEXIS 12762, at *4 (“Enhancement awards for class representatives serve the dual functions of recognizing the risks incurred by named plaintiffs and compensating them for their additional efforts.”). Service awards are particularly appropriate in class actions against employers because “the plaintiff is frequently a present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril.” *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 201 (S.D.N.Y. 1997)

⁷ One of the original five Class Representatives, Brandon Marshall, died after the Settlements were reached. The service award requested on his behalf will be provided to Mr. Marshall’s estate. *See Harvey Decl.*, ¶ 3.

(approving individual service awards of \$85,000 and \$50,000 to plaintiffs who had initiated a class action, and \$25,000 to named plaintiffs who joined lawsuit after its commencement). Even where there is not a record of actual retaliation, Class Representatives deserve recognition for assuming the risk of retaliation for the sake of absent class members. *See, e.g., Sewell v. Bovis Lend Lease LMB, Inc.*, No. 09-6548, 2012 U.S. Dist. LEXIS 53556, at *41 (S.D.N.Y. April 20, 2012) (“Plaintiffs litigating cases in an employment context face the risk of subjecting themselves to adverse actions by their employer.”); *Guippone v. BH S&B Holdings, LLC*, No. 09 Civ. 1029, 2011 U.S. Dist. LEXIS 126026, at *20 (S.D.N.Y. Oct. 28, 2011) (“Even where there is not a record of actual retaliation, notoriety, or personal difficulties, class representatives merit recognition for assuming the risk of such for the sake of absent class members.”).

Though the Class Representatives here were no longer employed by Defendants at the time they joined the lawsuit, they risked retaliation from their current employers and put their ability to secure future employment at risk as well. Devine Decl., ¶ 9; Fichtner Decl., ¶ 9; Hariharan Decl., ¶ 9; Stover Decl. ¶ 9; Harvey Decl., ¶ 10. *See also Sewell*, 2012 U.S. Dist. LEXIS 53556, at *42 (“[F]ormer employees . . . fac[ed] [sic] potential risks of being blacklisted as ‘problem’ employees.”); *Guippone*, 2011 U.S. Dist. LEXIS 126026, at *20 (“Today, the fact that a plaintiff has filed a federal lawsuit is searchable on the internet and may become known to prospective employers when evaluating the person.”); *Parker*, 2010 U.S. Dist. LEXIS 12762, at *4 (“[F]ormer employees put in jeopardy their ability to depend on the employer for references in connection with future employment.”).

C. **The Class Has Benefited Significantly Due To The Class Representatives’ Actions**

The \$20 million Settlement Fund provides a meaningful benefit to the class. This litigation would not have been possible without the Class Representatives’ involvement. *See In re Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992) (“Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers’ nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable.”). Courts acknowledge that class

1 representatives play a crucial role in bringing justice to those who would otherwise be hidden
2 from judicial scrutiny. Service awards “provide an incentive to seek enforcement of the law
3 despite these dangers.” *Parker*, 2010 U.S. Dist. LEXIS 12762, at *4-5. *See also Velez v. Majik*
4 *Cleaning Serv.*, No. 03-8698, 2007 U.S. Dist. LEXIS 46223, at *23 (S.D.N.Y. June 22, 2007)
5 (“[I]n employment litigation, the plaintiff is often a former or current employee of the defendant,
6 and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole,
7 undertaken the risk of adverse actions by the employer or co-workers.”) (internal quotation marks
8 and citation omitted).

9 The circumstances in which these Class Representatives advanced this litigation comply
10 with the principles in *Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157, 1165 (9th
11 Cir. 2013). At no time was any Class Representative advised by Class Counsel that his
12 entitlement to a service award was conditioned in any way on that Class Representative’s support
13 for the Settlement Agreement. Dermody Decl., ¶ 20. Likewise, the attorney representation
14 agreements for each of the Class Representatives preserved the right of each to separately and
15 independently support, object to or comment upon any settlement. *Id.*

16 No Class members have objected to the requested service awards. Dermody Decl., ¶ 19.
17 Furthermore, the requested service awards in this case do not give rise to a conflict that renders
18 the Class Representatives inadequate. The requested service awards amount to 0.4 percent of the
19 total recovery, which is a reasonable percentage. *See, e.g., Parker*, 2010 U.S. Dist. LEXIS
20 12762, at *6 (finding that service awards totaling 11 percent of the total recovery are reasonable
21 “given the value of the representatives’ participation and the likelihood that class members who
22 submit claims will still receive significant financial awards”); *Reyes v. Altmarea Group*, No. 10-
23 6451, 2011 U.S. Dist. LEXIS 115984, at *25 (S.D.N.Y. Aug. 16, 2011) (approving awards
24 representing approximately 16.6 percent of the settlement); *Frank*, 228 F.R.D. at 187 (approving
25 award of approximately 8.4 percent of the settlement).

26 Accordingly, this factor is satisfied.
27
28

D. The Service Awards Sought In This Case Are Modest Compared to the Awards Granted in Other Complex Litigation.

In major antitrust and employment litigation, many courts have awarded substantially larger service awards than those sought for Class Representatives in this case. Service awards in an amount greater than \$20,000 are not uncommon. *See, e.g., Vedachalam v. Tata Consultancy Servs.*, No. 06-0963, 2013 U.S. Dist. LEXIS 100799, at *7 (N.D. Cal. July 18, 2013) (approving service awards of \$25,000 and \$35,000 for class representatives); *Meijer, Inc. v. Abbott Labs*, No. 07-5985, Docket No. 514 (N.D. Cal. Aug. 11, 2011) (granting award of \$60,000 per class representative on \$52 million antitrust settlement); *Lewis v. Wells Fargo & Co.*, No. 08-2670, Docket No. 315 (N.D. Cal. April 29, 2011) (approving services awards of \$22,000 and \$20,000 for named plaintiffs); *Ross v. US Bank Nat. Ass’n*, No. 07-02951, 2010 U.S. Dist. LEXIS 107857, at *6 (N.D. Cal. Sept. 29, 2010); *Amochaev v. Citigroup Global Markets, Inc.*, No. 05-1298 PJH (N.D. Cal. Aug. 13, 2008) (awarding individual service awards of \$50,000 and \$35,000 to employees suing former employer in light of factors that included fear of workplace retaliation); *In re CV Therapeutics*, No. 03-3709, 2007 U.S. Dist. LEXIS 98244, at *5 (N.D. Cal. April 4, 2007) (approving \$26,000 award “for reimbursement of time and expenses incurred in representing the class”); (approving \$20,000 service award for each of four class representatives in recognition of “substantial contributions to the case”); *see also Calibuso v. Bank of America Corp.*, No. 10-1413 (E.D.N.Y Dec. 27, 2013) (approving service awards of \$35,000 for each of the four named plaintiffs); *In re: Titanium Dioxide Antitrust Litig.*, No. 10-00318, Docket No. 556 (D. Md. Dec.13, 2013) (approving service awards totaling \$175,000, including \$125,000 to one class representative as part of a \$163.5 million antitrust settlement); *Rochester Drug Co-Operative, Inc. v. Braintree Laboratories, Inc.*, No. 07-142, Docket No. 243 (D. Del. May 31, 2012) (approving three class representatives awards of \$60,000 each for \$17.25 million antitrust settlement); *In re Metoprolol Succinate Antitrust Litig.*, No. 06-52, Docket No. 193 (D. Del. Feb, 21, 2012) (approving three class representatives awards of \$50,000 each for \$20 million antitrust settlement); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-00340, Docket No. 543 (D. Del. Apr. 23, 2009) (\$50,000 service awards to each of three class representatives for \$250

1 million antitrust settlement); *Meijer, Inc. v. Barr Pharms.*, No. 05-2195, Docket No. 210 (D.D.C.
2 Apr. 20, 2009) (awarding \$50,000 to each of five class representatives—a total of \$250,000—for
3 a \$22 million antitrust settlement); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 479-80
4 (D.N.J. 2008) (approving awards of \$60,000 each to the class representatives on \$215 million
5 settlement); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 338-39 (E.D. Pa.
6 2007) (approving service award of \$75,000 as part of a \$39.75 million antitrust settlement); *In re*
7 *Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 531 (E.D. Mich. 2003) (\$75,000 awarded to two
8 class representatives as part of a \$80 million antitrust settlement); *In re Revco Sec. Litig.*,
9 No. 851, 1992 U.S. Dist. LEXIS 7852, at *7 (N.D. Ohio May 6, 1992) (approving \$200,000
10 service award as part of a \$29.75 million settlement); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185,
11 203-04 (S.D.N.Y. 1997) (awarding \$85,000 to a class representative as part of a \$115 million
12 settlement).

13 The service awards of \$20,000 requested here are reasonable and well within the range
14 awarded by courts in this District and beyond.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court award (1) attorneys' fees to Class Counsel in the amount of \$5,000,000 (*i.e.*, twenty-five percent of the \$20,000,000 Settlement Funds); (2) reimbursement of \$3,699,844.31 in expenses that Class Counsel necessarily incurred in connection with the prosecution of this action up to Preliminary Settlement Approval; and (3) service awards of \$20,000 for each of the Court-appointed Class Representatives and the Estate of recently-deceased Class Representative Brandon Marshall.

Respectfully submitted,

Dated: March 5, 2014

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